IMOWAY CORPORATION (M) SDN BHD A

v.

LIM AI KIONG

HIGH COURT SABAH & SARAWAK, SIBU B
YEW JEN KIE J
[ORIGINATING SUMMONS NOS: 24-39-2010
& 24-48-2010]
15 NOVEMBER 2010

C

LAND LAW: *Caveat - Removal of - Whether defendant entitled to lodge caveat on land - Whether defendant had caveatable interest on parcels of land - Whether caveat could be removed to allow plaintiff to deal freely with land - Whether plaintiff had locus standi to file application - Whether plaintiff could rely on development agreement and power of attorney to initiate proceeding under s. 177 Land Code (Cap. 81) (Sarawak) - Whether plaintiff entitled to injunctive relief to prevent further caveats from being lodged by defendant's other siblings* D

LAND LAW: *Power of attorney - Rights and interest on grant of - Development agreement - Whether power of attorney would have been extinguished following expiry of development agreement - Whether plaintiff had 'registered interest' - Land Code (Cap. 81) (Sarawak), s. 177(1)* E

This was an action by the plaintiff to remove a caveat lodged by the defendant on certain parcels of land. The defendant, his siblings and his late mother had entered into an agreement with the plaintiff to develop their joint lands including Lot 1223 into a housing/commercial estate on a barter basis. Pursuant thereto, the defendant granted the plaintiff two powers of attorney to deal with the development. The defendant's uncle and his wife were both the directors and shareholders of the plaintiff. Upon obtaining approval, the plaintiff was allowed to carry out development in seven phases. However, due to the caveat lodged by the defendant, the plaintiff was unable to obtain a loan to finance phase four and hence, could not commence work thereon. The plaintiff contended that the defendant did not have a caveatable interest on the parcels of land and relied on the development agreement and the powers of attorney to initiate a proceeding under s. 177(1) of the Land Code (Cap. 81) (Sarawak) ('the Act'). The defendant, on the other hand, contended that the plaintiff was not a registered owner by virtue of s. 177(1) of the Act and, thus, it could not avail itself of any right to the land. F G H I

Held (allowing the application):

(1) A person initiating a proceeding under s. 177(1) of the Act must show that he is "a registered proprietor or any other person having a registered estate or interest" on land which had been caveated. On the facts, the plaintiff's *locus standi* was premised on the development agreement and the powers of attorney. The powers of attorney clearly states that the donors of the powers of attorney including the defendant had accepted the plaintiff's offer and agreed to allow it to develop their land. The plaintiff as developer had been granted wide power by the defendant to deal with the land pursuant to several clauses stipulated on the powers of attorney and had practically stepped into the shoes of the defendant. In view of the above, the plaintiff was the one that had the registered interest mentioned in s. 177 of the Act and thus, had the standing to bring this application by virtue of s. 177(1) of the Act to remove the caveat. (paras 20, 29, 31 & 34)

(2) The caveat filed by defendant was based on proprietary and contractual rights under the development agreement. The defendant was not entitled to caveat his own interest due to the fact that as a registered proprietor, he failed to show that he had a distinct interest in the land. *Sharifah Mastura Tuanku Ibrahim v. Wan Aziz Ibrahim* (foll). (paras 39 & 41)

(3) The defendant had also failed to comply with s. 174(1) of the Act by not specifying the portion of the land he wished to protect. Hence, the caveat could not remain in the register. (para 47)

(4) Having regard to the aforesaid, the defendant had failed to show that he had a caveatable interest on the land for the caveat to subsist. As such, the caveat was to be removed. In addition, the plaintiff was granted an injunction to stop further caveats from being lodged. (para 48 & 49)

Case(s) referred to:

David Gramong v. Rasit Tar [1991] 3 CLJ 2143; [1991] 2 CLJ (Rep) 535 HC ***(refd)***

Eu Finance Berhad v. Siland Sdn Bhd (M & J Frozen Food Sdn Bhd, Intervener) [1988] 1 LNS 200 HC ***(refd)***

Fung Yuk Lien v. Foong Chee Sam [2000] 6 CLJ 411 HC ***(refd)***

Glamour Green Sdn Bhd v. Ambank Bhd & Ors & Another Appeal [2007] 3 CLJ 413 CA ***(refd)***

Kundang Lakes Country Club Bhd v. Garden Master (M) Sdn Bhd [1999] 2 CLJ 633 CA ***(refd)***
Kumpulan Laudiri Sdn Bhd v. Tang Kah Ung & 2 Ors [2004] 1 LNS 97 ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng & Anor [1995] 3 CLJ 520 CA ***(refd)***
Pembinaan Masdamai Sdn Bhd v. Me-Wong Builders Sdn Bhd [1994] 3 CLJ 355 HC ***(refd)***
Robert Sim Teck Hock v. Koperasi Wanita Sarawak Bhd & Anor [2000] 8 CLJ 528 HC ***(refd)***
Sharifah Mastura Tuanku Ibrahim v. Wan Aziz Ibrahim [1994] 1 CLJ 298 HC ***(foll)***
T & TT Enterprise Sdn Bhd v. Lembaga Pembangunan Dan Lindungan Tanah [2009] 2 CLJ 160 CA ***(refd)***

Legislation refered to:
Land Code (Cap 81) (Sarawak), ss. 2, 174(1), 177(1)
National Land Code, s. 323(1)(a)

For the plaintiff - Alvin Yong; M/s Chong Brothers Advocates
For the defendant - David Kuok; M/s Wong, Orlando Chua & Kuok Advocates

Reported by Melanie Murthy

JUDGMENT

Yew Jen Kie J:

Introduction

[1] There are two applications before this court, namely; (1) Originating Summons No. 24-39-2010 and (2), Originating Summons No. 24-48-2010.

[2] In Originating Summons No. 24-39-2010, the applicant applied for the removal of the Caveat Instrument No L. 1317/ 2007 registered at the Sarikei Land Registry on 20 April 2007 against all that parcel of land described as Lot 1223, Block 34, Sarikei Land District ("Lot 1223") lodged by Lim Ai Kiong.

[3] In Originating Summons No. 24-48-2010, the applicant applied for the removal of the Caveat Instrument No. L. 206/2010 registered at the Sarikei Land registry on 14 January 2010 against all that parcel of land described as Lot 1223, Block 34, Sarikei Land District ("Lot 1223") lodged by Lim Su Kiong.

[4] Both applications involved the same parcel of land and the affidavits filed by both defendants are identical. All the facts and issues raised in the two applications are also similar. For this reason, this ruling shall also apply to the Originating Summons No. 24-48-2010.

Brief Facts

[5] In January 1993 the defendant's late mother Tay Eng Kwee, the defendant's siblings, Lim Su Kian and Lim Su Khong and the defendant had entered into an agreement with the plaintiff to develop their joint lands including Lot 1223 into a housing/ commercial estate on barter basis as evidenced by the agreement exhibited as LAK1 ("the development agreement").

[6] The defendant's uncle Lim Kim Khian and his wife Yong Siew Kee @ Yeo Siew Kee are both the directors and shareholders of the plaintiff.

[7] The defendant had granted two power of attorney to the plaintiff both dated 27 January 1993 and registered at the Sarikei Land Registry Office on 20 April 2000 as Instrument No. LI033/ 2000 and No. LI034.2000 respectively. See. Y2 and Y3 respectively.

[8] The approval of the application for amalgamation and subdivision of the lands was obtained on 28 May 1993. The development was allowed to be carried out in seven phases.

[9] The plaintiff had finished Phases 1, 2 and 3. Land and Development Plan for Phase 4 has been approved by the relevant authority.

[10] By reason of the caveat, the plaintiff was not able to obtain the loan to finance the Phase 4 of the development and to commence work thereon.

[11] The plaintiff contended that the defendant does not have a caveatable interest on all the undivided right to title share and interest in Lot 1223. No action has been filed by the defendant against the plaintiff. The purpose of the caveat is clearly to frustrate the development and to pressure the plaintiff to accede to the requests of the defendant and the defendant's siblings and is an abuse of the process.

Locus Standi

[12] Mr David Kuok, learned counsel for the defendant, contended that since the plaintiff is not the registered proprietor of Lot 1223, unless he can demonstrate that it is such a person having a registered estate or interest in Lot 1223, it cannot avail itself of any right under s. 177(1) of the Land Code.

[13] Mr Kuok then contended that the plaintiff has commenced this action on the ground that it is the donee of the power of attorney granted by the defendant. Learned counsel submitted that the power of attorney ie, Y2 and Y3 were granted by the defendant to the plaintiff pursuant to the development agreement. The recital to the power of attorney has specifically and expressly included the development agreement as an integral part of the power of attorney. Upon reading the power of attorney and the development agreement together, (*Glamour Green Sdn. Bhd. v. Ambank Bhd & Ors & Another Appeal* [2007] 3 CLJ 413 CA), it clearly shows that the defendant has appointed the plaintiff as the developer to develop various parcels of land including Lot 1223 and the plaintiff agrees to construct at its own costs and expenses the buildings. Upon completion of the defendant's houses in each phase, the plaintiff shall hand over and deliver vacant possession of the houses to the defendant and/or his nominees.

[14] Mr. Kuok submitted that upon the conjunctive construction of the power of attorney and the development agreement, it is clear that a contractual relationship between the plaintiff and the defendant is that of a joint venture agreement whereby the plaintiff developed the defendant's lands on barter basis. It is not a relation of principal and agent, citing *T & TT Enterprise Sdn. Bhd. v. Lembaga Pembangunan Dan Lindungan Tanah* [2009] 2 CLJ 160.

[15] Mr Kuok next submitted that the power of attorney was strictly granted for the joint venture between the plaintiff and the defendant for the plaintiff to carry out the development agreement. However, the development agreement had expired on 28 May 2005 and the defendant had on four separate occasions ie, 15 June 2005, 13 August 2005, 17 December 2005 and 14 March 2006 instructed his solicitors to inform the plaintiff that he had no intention to renew the agreement concerned.

[16] It was submitted that since the development agreement has come to an end on 28 May 2005 and the power of attorney which were created for the sole purpose of executing the

development agreement would have been extinguished following the expiry of the development agreement in respect of the new and undeveloped defendant's lands including Lot 1223.

[17] Mr Kuok also contended that if the plaintiff feels that the defendant has wrongfully terminated the development agreement on 28 May 2005, its remedy lies in an action for loss and damage, and not to force the defendant to remove the caveat in order to allow it to deal freely with the lands despite the express disagreement of the defendant.

[18] Section 177 of the Sarawak Land Code states:

> (1) Any registered proprietor or any other person having a registered estate or interest in the estate or interest against which a caveat has been lodged may at any time, if he thinks fit, apply to the High Court for an order that the caveats be removed.
>
> (2) ...

[19] It therefore follows that the person initiating a proceeding under s. 177(1) must show that he is "a registered proprietor or any other person having a registered estate or interest" in land which has been caveated. Unless the person can so prove, his legal standing in employing this provision will be challenged as lacking in *locus standi*.

[20] The plaintiff is relying on the development agreement and the power of attorney granted to it by the defendant pursuant to the development agreement to initiate the proceeding under s. 177. As to whether the power of attorney gives standing to the plaintiff to do so will depend on the interpretation of the words "registered interest" in s. 177(1) of the Land Code.

[21] The defendant relied on *Pembinaan Masdamai Sdn. Bhd. v. Me-Wong Builders Sdn. Bhd.* [1994] 3 CLJ 355, *Robert Sim Teck Hock v. Koperasi Wanita Sarawak Bhd & Anor* [2000] 8 CLJ 528, to support his contention that the plaintiff has no *locus standi* to make the present application under s. 177(1) of the Land Code.

[22] On the other hand, the plaintiff relied on *David Gramong v. Rasit Tar* [1991] 3 CLJ 2143; [1991] 2 CLJ (Rep) 535; and *Kumpulan Laudiri Sdn. Bhd. v. Tang Kah Ung & 2 Ors* [2004] 1 LNS 97 (HC).

[23] It will be seen from the authorities cited by the defendant that the court has adopted a strict interpretation whereas the judges in the cases cited by the plaintiff have adopted a more liberal approach on their interpretation of "registered interest" in s. 177 of the Land Code.

[24] In *Pembinaan Masdamai Sdn. Bhd., supra*, the main issue was the effect of the endorsement of the power of attorney on the sub-divided issue document of title. The defendant contended that the plaintiff had no *locus standi* to commence the action as it was not within the category of persons specified under s. 177(1) of the Land Code. It was held:

> A power of attorney would not give an interest in land. To say that the word "interests" in s. 45(3) is wide enough to cover a power of attorney would not be consonant with the usual status accorded to a power of attorney. Therefore, the purported enforcement of the power of attorney on the sub-divided issue document of title was of no consequence as it is not provided for by the Code or under any written law currently in force in Sarawak. Accordingly, the plaintiff had not met the requirement of s. 177(1) of the Code and had no *locus standi* to commence this proceedings.

[25] In *Robert Sim Teck Hock, supra*, Unibor (the holder of the power of attorney given by the 1st defendant) objected to the caveats being allowed to remain on the register, Sulaiman Daud, JC (as he then was), held that an attorney does not give an interest in land and is not a registered instrument conferring an estate or interest. Thus, Unibor had no *locus standi* to apply for a removal of caveats.

[26] In *David Gramong, supra*, the respondent was the registered proprietor of certain land which he sold to the applicant for $260,000. The applicant failed to pay the balance within the stipulated time. There was also an agreement between the applicant and the respondent whereby the applicant had to construct 250 double-storey concrete terrace houses for the respondent. The agreement granted the applicant a power of attorney empowering him with "full power" to develop and to deal with the land. Time was the essence of the agreement.

One parcel of land was charged by the applicant to a bank. In view of the applicant's failure to pay the balance of the purchase price at the stipulated time and fearing that the applicant would create further charge on the land the respondent lodged the caveats.

[27] Justice Chong Siew Fai (as he then was) upon observation that the word "interest" is not defined in s. 2 of the Land Code, went on to say:

> In the instant case, the applicant is not merely a purchaser under contract but someone armed with a duly registered valid power of attorney conferring upon him wide range of powers including power to effect dealings (as defined in s. 2 of the Land Code) and to commence prosecute or enforce actions or legal proceedings relating to any matters in connection with the said lands. In my opinion the words "registered interest" include a right, power or privilege validly granted over or in connection with land, at least for the purpose of the said s. 177(1) and are broad enough to enable the applicant to make the present application.

[28] *David Gramong*'s case was followed by *Kumpulan Laudiri Sdn. Bhd. v. Tang Kah Ung & 2 Ors* [2004] 1 LNS 97 (HC). In the latter case, the plaintiff claimed over 73% of the properties built on the land and the plaintiff's has an absolute right to sell these properties. The court held that by the power of attorney which granted the plaintiff entitlement to absolutely claim possession of and interest concerning the plaintiff's sublets, coupled with the power to execute Memorandum of Transfers in respect of these sublets had *locus standi* under s. 177(1) of the Land Code.

[29] As stated earlier the plaintiff's *locus standi* is premised on the development agreement and the power of attorney. Reading these two documents together, it is clear that the defendant has given wide power to the plaintiff to carry out the development of Lot 1223.

[30] Clause 16 of development agreement states that the owners shall execute in conjunction with the development agreement a power of attorney appointing the developer as their lawful attorney to do, amongst others, to mortgage charge or raise a bridging loan from a reputable bank or financial institution on the security of the land and to enter into agreement for the sale of the developers' sublets and to transfer the same to respective purchasers thereof.

[31] Clause 9 of the development agreement (p. 5 of exh. Y1 in both originating summons) allows the plaintiff to charge the lands for a bridging loan. The power of attorney (exh. Y2) clearly states that the donors of the power of attorney including the defendant accepted the offer of the plaintiff and agreed to allow the plaintiff to develop the land.

[32] The power of attorney also allows the plaintiff "to sell and dispose of all the sublets which under the development agreement are to be transferred to the Developer for such price as the attorney shall deem fit". A

[33] Clause 12(11) of the power of attorney also empowers the plaintiff to do every other act matter or thing which may be or which may by our attorney be deemed to be necessary or proper in relation to the premise. B

[34] The plaintiff as developer has been granted wide power by the defendant to deal with the land including to "do every other act matter or thing which may be or which may by our Attorney be deemed to be necessary or proper in relation to the premises" and has practically stepped into the shoes of the defendant. Adopting the generous interpretation given by Justice Chong Siew Fai in *David Gramang*'s case, *supra*, I am of the view that the plaintiff is the person who has registered interest for whom s. 177 intended. Thus, it has the standing to bring this application under s. 177(1) to remove the caveats. C D

Whether The Defendant Has Caveatable Interest? E

[35] It must be borne in mind that the foremost issue which the court must address in cases relating to caveats is whether the caveator has caveatable interest for the caveats to subsist. (See: *Kundang Lakes Country Club Bhd v. Garden Master (M) Sdn. Bhd.* [1999] 2 CLJ 633 (CA)). F

[36] It is the general rule that a registered proprietor of land cannot lodge caveats on his own land. The rationale for this is explained in *Eu Finance Berhad v. Siland Sdn. Bhd. (M & J Frozen Food Sdn. Bhd., Intervener)* [1988] 1 LNS 200, in which *Siland* as the owner of the land argued that by virtue of that status alone it acquired the right to enter and maintain the caveat because of the words of the first limb of s. 323(1)(a) of the National Land Code 1965. LC Vohrah J (as he then was) held: G H

> A person who relies on his status as registered owner must necessarily be a person already possessing title or interest in the land and not merely a person excluded by the language of s. 323(1), for he is not "claiming" title to the land title is already his. I

[37] Accordingly, the court held:

> As *Siland* has founded its right to caveats solely on its status as the registered owner of the said land, Siland merely as registered owner was not entitled to caveat its own interest. An order in terms of the application was granted in that the caveats lodged by Siland be removed forthwith by the Registrar of Titles.
>
> (See also; *Saw Cheng Boon v. Mohd Farook b. Shaik Mohaidin* [1995] 3 CLJ 759).

[38] In my opinion, the decision in *Eu Finance* in relation to s. 323 of the National Land Code is equally applicable to the provisions regulating caveats in Sarawak.

[39] However, there is exception to this general rule. That exception is that a registered owner must show a distinct interest in the land other than that he is the registered owner. In *Sharifah Mastura bte Tuanku Ibrahim v. Wan Aziz Ibrahim* [1994] 1 CLJ 298, Abdul Kadir Sulaiman J (as he then was) held:

> A registered proprietor of land was not entitled to enter a private caveat in respect of his own land unless he could show some circumstances which affirmatively gave rise to a distinct interest in the land other than the fact that he was the registered proprietor of the property. The onus was on the registered proprietor/caveator to satisfy the court that he has a caveatable interest within the exception.

[40] A perusal of the statutory declaration filed by both defendants in support of the caveat, particularly para. 15 of exh. Y11 in O.S. No. 24-39-2010 and para. 17 of exh. Y9 in O.S. No. 24-48-2010, which are *pari materia*, stated that the purpose of the statutory declaration is to support the lodgement of a caveat on the land in order to protect their respective rights, shares and beneficial interest in the land according to the development agreement and to prevent the registration of any further adverse dealing of the land by the plaintiff without their knowledge and consent.

[41] In the premise, I would agree with Mr Yong who submitted that the caveats filed herein by both the defendants are based on proprietary rights and contractual rights under the development agreement. As the defendants failed to establish a set of circumstances above and beyond their status as registered

proprietors, I, on the authority of *Sharifah Mastura bte Tuanku Ibrahim, supra*, hold that the defendants are not entitled to caveat their own interest.

[42] It is undisputed and admitted fact that both defendants are the registered proprietors of 1/9 of Lot 1223. In the affidavit of both the defendants, they claim to own 8.30% of the lands and 2.24% of the proportion of each type of subdivided lots of each phase under the development agreement.

[43] Section 174 of the Land Code states:

> 174. (1) Every caveat shall be signed by the caveator, or by his attorney or agent, and shall state with sufficient certainty the nature of the estate or interest claimed by the caveator and how it is derived from the proprietor. It shall also appoint a place, or give an address, within Sarawak at or to which notices and proceedings relating to the caveats may be served or addressed.

[44] It is evident from the statutory declarations is support of the caveats filed by both the defendants that they lodged the caveats in respect of the whole of the land without expressly stating that it was to protect their limited interest in the land only.

[45] Mr Yong submitted that in view of the aforesaid, the caveats lodged by the defendants suffer from a defect which renders the caveats defective and invalid and null and void.

[46] To support his contention, he cited *Fung Yuk Lien v. Foong Chee Sam* [2000] 6 CLJ 411 (HC), In this case the defendant caveated the whole of the land without expressly stating that it was to protect her limited interest in the land only. Tee Ah Sing J (as he then was) held that the non-compliance with the mandatory provision in s. 174(1) has rendered the defendant's entry of caveat against the whole of the land null and void and of no effect and the court has no power to allow a defective or invalid caveat to remain. He therefore ordered that the caveat lodged by the defendant to be removed from the register.

[47] Having regard to the fact that the defendants have also failed to comply with s. 174(1) of the Land Code in failing to specify the portion of the land they wish to protect, I hold that the caveats cannot remain in the register.

[48] Having regard to all the reasons aforesaid, I feel compelled to find that the defendants have failed to show that they have caveatable interest for the caveats to subsist. Accordingly, the proper order for me to make is for the caveats to be removed forthwith without having to consider the three stages set out in *Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng & Anor* [1995] 3 CLJ 520. I do hereby order in terms of relief (i) and (iii) of the originating summons.

Injunctive Relief

[49] Mr Yong submitted that an examination of the caveats and the affidavit would show that the defendants (who are brothers) have taken turn to lodge caveats to disrupt the plaintiff to proceed with the development under the development agreement. The caveat in O.S. No. 24-39-2010 was lodged in 2007 while the caveat in O.S. No. 24-48-2010 was lodged in 2010. The defendants have deposed that their other siblings also have shares in the land. It was submitted that it is therefore not unforeseeable for the plaintiff to seek injunction at this juncture to stop further caveats being lodged in view of the acts of the defendant.

[50] I would agree with Mr Yong on this. Hence, I order in terms of relief (ii).

Costs

[51] Order in terms of relief (v) of the originating summons.